allow the government an appeal where it can have no effect on the fate of the defendant. It is unnecessary to consider whether or not such a provision would be unconstitutional; it is enough that bench and bar unite in condemning such proceedings, as productive of *ex parte* arguments and consequently poor decisions.[4] For this reason the House bill before mentioned seems ill-advised in providing that the government may appeal after a verdict of acquittal, but that the verdict shall not be set aside. Moreover, the enactment must not involve "double jeopardy" within the constitutional prohibition,[5] as construed by the United States Supreme Court. Under the rulings of this court jeopardy begins at the moment when the jury is empanelled and sworn,[6] at least "if the preliminary things of record are ready for the trial."[7] If there is a valid indictment and a jury sworn,[6] and also, it is held, if there is a defective indictment with a verdict of acquittal on the merits,[8] the accused has been in jeopardy. Conversely, no jeopardy is produced by preliminary proceedings such as a motion to quash or demurrer to the indictment;[9] and if after conviction the prisoner moves for arrest of judgment because of insufficiency of the indictment, his former jeopardy, if any, should be considered waived.[10] Under these doctrines of jeopardy, the Senate bill already cited seems particularly happy in granting the government an appeal in all those cases, and those only, where it may be allowed with legal and constitutional propriety. The seriousness of the evils existing at present, and the possibility of an entirely unobjectionable enactment of much remedial efficacy, seem to bespeak for the President the hearty support of the legal profession in his efforts to secure the timely passage of the recommended legislation.

POSTPONEMENT OF FUTURE GIFT "AS LONG AS LEGALLY POSSIBLE." — At common law no future interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest.[1] Courts have consistently refused to restrict the choice of lives to beneficiaries under the gift, or to limit the number which may be taken to measure its postponement.[2] Twenty-eight lives have been held not too many,[3] and the reason is given as Twisden put it: "All the candles are lighted at once."[4] The lives taken must not, however, be so numerous or so obscure as to preclude ascertainment by reasonable evidence at what time the survivor ceases to exist.[5] Thus a gift twenty-one years after the death

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[4] See Senator Spooner's remarks, Congressional Record, 1st Session 59th Congress, 9033. *Cf.* Wambaugh, Study of Cases, 2 ed., § 5.

[5] See U. S. Const., Fifth Amend.

[6] See Kepner *v.* United States, 195 U. S. 100, 128. See also 18 HARV. L. REV. 216.

[7] *Cf.* 1 Bish., Crim. L., 7 ed., § 1020.

[8] United States *v.* Ball, 163 U. S. 662. See also Kepner *v.* United States, *supra*, 130.

[9] See Kepner *v.* United States, *supra*, 130.

[10] United States *v.* Ball, *supra*, 672. *Cf.* Joy *v.* The State, 14 Ind. 139.

[1] Gray, Rule Perp., 2 ed., § 201.

[2] Thellusson *v.* Woodford, 4 Ves. 227.

[3] Cadell *v.* Palmer, 1 Cl. & F. 372. *Cf.* Humberston *v.* Humberston, 1 P. Wms. 332, where Lord Cowper decreed that an executory trust of a perpetuity be settled upon some fifty life-tenants and then over in tail.

[4] Love *v.* Windham, 1 Sid. 451.

[5] Gray, Rule Perp., 2 ed., § 217.

of all persons in the world now alive, though within the rule against remoteness, violates this independent rule against uncertainty.[6]

An express provision in a will that the postponement be "as long as the law allows" raises a perplexing question. A testator may effectively say that his gift is to comply with the rule against perpetuities, but a declaration that it is not to violate the rule against uncertainty cannot render it certain. Definite lives are essential to the period of postponement, and if the will so designate lives therein mentioned, however slightly, they will be taken. This was the unchallenged procedure in an English case where counsel agreed that the testator designated one or the other of two sets of lives mentioned, and asked the court to decide which.[7] The Supreme Court of Hawaii has recently declared that a trust to pay annuities to forty-two annuitants and their heirs "for as long a period as is legally possible," and then to divide the *corpus* equally among the then annuitants, clearly discloses an intent that the lives of the annuitants measure the period of postponement. *Fitchie* v. *Brown*, November 1, 1906. The court thereby first imputes to the testator knowledge that the rule against perpetuities depends upon lives, and then finds that he meant these lives in fact. Such intention seems very doubtful. Mention of persons for purposes of munificence is at best shadowy evidence that they are incidentally designated as measuring-rods. And though solicitous that his gift not fail, the testator would scarcely have opposed an interpretation which would protect his beneficiaries against their own improvidence even longer than these forty-two lives and twenty-one years. The lives of the inmates of the Kona orphanage (one of the annuitants) would doubtless have suited him better.

It may well be, therefore, that under guise of construction courts are unwittingly laying down a rule of law that where a future gift is to take effect at the remotest time the law will allow without further direction as to that time, coupled with a gift meanwhile of income, the court will remedy the uncertainty by looking to the will for lives with which to measure the period of postponement. Such a rule, if adopted, would reach a desirable result without even beneficent violence to the words of the will. It would be convenient, for the beneficiaries would remain so near to their annual payments that their decease would be speedily known. It would have analogy for its attitude toward uncertainty. A direction that a legatee be supported according to his condition in life is valid.[8] A gift to two persons in such shares as a third shall appoint, will on failure of appointment be equaliy divided.[9] A gift of income for as long a period as another shall appoint, and then of the *corpus* absolutely, would hardly be let fail for want of appointment.[10] On the other hand, courts are indisposed to favor those who seek by general language to guard themselves against forbidden policies. Though a contract in reasonable restraint of trade is enforcible, a man cannot bind himself to refrain from a business "so long as the law allows." Such an agreement invites litigation and burdens courts.[11] Nor will a settlement of chattels to go with settled land "as far as law and equity permit" be construed as executory in order more perfectly to carry out the settlor's intent.[12]

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[6] *In re* Moore, [1901] 1 Ch. 936.
[7] Pownall *v.* Graham, 33 Beav. 242.
[8] Broad *v.* Bevan, 1 Russ. 511.
[9] Salusbury *v.* Denton, 3 Kay & J. 529. *Cf.* 1 Jarman, Wills, 5 ed., *357 *et seq.*
[10] See Holmes *v.* Walter, 118 Wis. 409.
[11] Davies *v.* Davies, L. R. 36 Ch. 359.
[12] Vaughan *v.* Burslem, 3 Bro. Ch. 101. See Gray, Rule Perp., 2 ed., §§ 365 *et seq.*